United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-5012

United States Court of Appeals

For the Second Circuit.

B

P/S

In the Matter of

THE BOHACK CORPORATION,

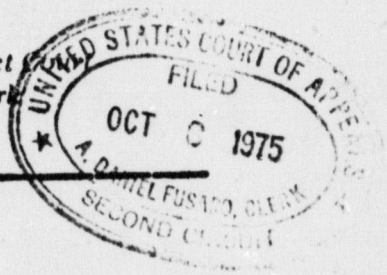
Debtor

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,
Plaintiff-Appellee,

-v-

THE BOHACK CORPORATION,
Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York



Appellant's Brief

SHAW & LEVINE
Attorneys for Appellant
770 Lexington Avenue
New York, N.Y. 10021

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UNITED STATES COURT OF APPEALS
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In the Matter of
THE BOHACK CORPORATION,
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GENERAL WAREHOUSEMEN'S UNION, LOCAL #852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff-Appellee,

-v-

THE BOHACK CORPORATION,

Defendant-Appellant.

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from an order of the Honorable Jacob Mishler, United States District Judge for the Eastern District of New York, dated April 21, 1975 which affirmed an order of the Honorable Albert C. Parente, Bankruptcy Judge, which granted judgment for the plaintiff herein and held that severance pay for Union members who were discharged after the date of filing of the original petition pursuant to Chapter XI of the Bankruptcy Act by the Bohack Corporation, constituted an administration claim against the estate, pursuant to Section 64a(1) of the Bankruptcy Act.

Issue Presented

The sole issue presented here is whether severance pay should be treated as an administration claim against the estate of the debtor pursuant to Section 64a(1) of the Bankruptcy Act, or as a wage priority claim pursuant to Section 64a(2) of the Bankruptcy Act. We recognize in stating the issue that this Court has previously decided the question in the case of *In the Matter of Straus-Duparquet, Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers,* 386 F.2d 649 (1967). We respectfully suggest, however, that public policy grounds require a reversal of such position and, moreover, that the weight of authority in other Circuits is to the contrary.

Argument

Severance Pay Should Be Treated as a Priority Claim under Section 64a(2) of the Bankruptcy Act and Not an Administration Claim under Section 64a(1) of the Bankruptcy Act.

We have indicated in our statement of the issue that this Court has held that severance pay is an administration claim against the estate of the debtor *In the Matter of Straus-Duparquet, supra.* We respectfully suggest that this Court should review its holding in light of the policy questions that arise in a Chapter XI proceeding such as the one at bar, where such a holding may in fact lead to the impossibility of establishing a viable plan of arrangement for the debtor.

The reasoning of this Court with respect to severance pay as expressed *In the Matter of Straus-Duparquet,* is as follows:

> "Severance pay was properly held to be an expense of administration. Severance pay is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances. After the period of eligibility is served, the full severance pay is due

whenever termination of employment occurs. Severance pay is

> 'a form of compensation for the termination of the employment relation, for reasons other than the displaced employees' misconduct, primarily to alleviate the consequent need for economic readjustment but also to recompense him for certain losses attributable to the dismissal.' *Adams v. Jersey Central Power & Light Company*, 21 N.J. 8, 13-14, 120 A.2d 737, 740 (1956).
>
> Since severance pay is compensation for termination of employment and since the employment of these claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such an expense."

That case is the only authority for such a holding. Most of the cases throughout the other Circuits have treated severance pay as a priority wage claim rather than an administration claim. In the only other case holding severance pay to be an administration claim in part, *In Re Public Ledger*, 161 F.2d 762 (3d Cir., 1947), the Court said that that portion of the severance pay earned after the filing of the petition was to be treated as an administration claim and that portion earned prior to the filing was to be treated within the provisions of Section 64a(2) of the Bankruptcy Act. Thus, the Court said, at page 774:

> "As a recapitulation, under the Guild contract the money to be paid under the provision for discharge pay is held to be wages and entitled to payment out of the estate. That part earned under the administration of the trustees is entitled to priority as administration expenses, §64, sub. a(1). That part earned within the provisions of §64, sub.a(2) is entitled to the priority provided for by that section of the Bankruptcy Act. (Here the severance pay was conditioned upon a given length of service.)"

Closer to the reasoning of this Court in *Straus-Duparquet* that severance pay is compensation for termination of employment is *In Re Ad Service Engraving Company*, 338 F.2d 41 (6th Cir., 1964) where the Court held that termination pay constitutes damages rather than wages earned, but reached an entirely contrary result and held that severance pay claims were equivalent merely to general unsecured claims and should be denied priority under Section 64a(2).

Assuming the validity of the general rule that severance pay is entitled to a Section 64a(2) priority, what this Court did in *Straus-Duparquet* was to change the claim from a wage claim to a damage claim with a super priority. In attempting to alleviate the consequences of loss of employment, the Court extended the Section 64a(2) priority and treated severance pay claims as liquidated damages.

We respectfully submit that there is no warrant in law or equity for such a result. Other creditors who suffered damages as the result of the filing of a Chapter XI petition or acts of the debtor consequent to that filing are relegated to general unsecured claims, or to specific statutory relief as set forth in the Bankruptcy Act. An obvious example is a landlord with whom a debtor had a lease which the debtor seeks to terminate under the protection of the Bankruptcy Court. By statute the landlord is relegated to a general unsecured claim for damages, equivalent to three years rental. Congress, in enacting Section 64a(2) of the Bankruptcy Act, set forth specific statutory relief for wage earners. We respectfully submit that there is no general equity power in the court to extend such statutory relief to the super priority we have ascribed to the beneficiaries of the holding in *Straus-Duparquet*.

If the court appropriately balances the equities in such a case, in this case the contrary holding would be required. Although the original claim of the Appellee was on behalf of approximately 56 employees of the Union, by stipulation approved by the Bankruptcy Court, the result was made to apply to all employees similarly situated. In this case then, the debtor would

be subject to an immediate payment of more than $600,000 to the former employees upon confirmation of a plan of arrangement (A-43). Such a required payment might in fact prevent a satisfactory plan from being proposed and confirmed. A significant difference between the two cases, it should be remembered, is that in *Straus-Duparquet* the number of employees and dollars involved was significantly less than here, both in absolute and relative terms, taking into account the operations of the two businesses. Here, in order to survive, Bohack was forced to go out of its warehouse and delivery business completely and change the whole nature of its operation to a purely retail supermarket chain, significantly reduced in size and scale. The imposition of an additional burden of an unwarranted administration claim would create great hardship to the other creditors of Bohack, many of whom, primarily the trade creditors, were as intimately concerned with the day-to-day business of Bohack as Bohack's own employees, and who in many cases suffered almost as much as the employees.

As noted before, *In Re Public Ledger,* is the case most cited for the proposition that priority should be attributed to severance pay claims, and in that case, as well as others facing that issue, a variety of labor contracts were interpreted in such a way so that any claim for any kind of compensation in lieu of dismissal notice or on account of dismissal could be considered severance pay for the purpose of attaining a priority under Section 64a(2) of the Bankruptcy Act. In none of them, however, was a 64a(1) preference granted. See *McCloskey v. Division of Labor Law Enforcement,* 200 F.2d 402 (9th Cir., 1952); *In Re Otte,* 146 F.Supp. 786 (DC Cal. 1956); *In Re Men's Clothing Code Authority,* 71 F.Supp. 469 (S.D.N.Y. 1937).

In conclusion, it is respectfully submitted that the holding of this Court *In the Matter of Straus-Duparquet* extends the statutory relief to be granted to employees of companies seeking protection under the Bankruptcy Act beyond the scope of the congressional intent and beyond all other decisional law in the federal system. Although the court was obviously attempting to seek an appropriate result for the protection of the people

employed by the debtor in *Straus-Duparquet*, to work such a result in this case would severely hamper the proposal and implementation of a successful plan of arrangement, and thus, the equitable nature of the court's relief would work a greater inequity on the remaining employees of the debtor.

Conclusion

The order of the District Court affirming the Bankruptcy Judge in holding that severance pay claims are administration claims against the estate pursuant to Section 64a(1) of the Bankruptcy Act should be reversed.

October 6, 1975

Respectfully submitted,

SHAW & LEVINE
Attorneys for Appellant
770 Lexington Avenue
New York, N.Y. 10021

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 230 Richmond Avenue, Staten Island, N.Y. 10302. That on the 8 day of Oct, 1975 deponent served the within Brief upon Leizel, Sommers + Schwartz

attorneys(s) for appellee

in this action, at 225 West 34th St
N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
8 day of Oct, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976